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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FRANKLIN ONTIVEROS et al., Defendants and Appellants.	D050764 (Super. Ct. No. SCD160817)

APPEALS from judgments of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed, with directions to dismiss count 3.

A jury convicted Franklin Ontiveros, Rolando Montez and Johnnie Mae Johnson of conspiracy to commit grand theft (Pen. Code,[1] §§ 182, subd. (a), 487, subd. (a)) and conspiracy to obtain property, labor or services by false pretenses (§§ 182, subd. (a), 532, subd. (a)) as part of a pyramid real estate scheme that was supposed to provide houses for low-income Latinos of the Christian faith who otherwise could not afford them. In

1 Statutory references are to the Penal Code unless otherwise specified.

connection with these counts, the jury found Ontiveros and Montez committed at least two felonies involving fraud or embezzlement of more than $500,000 (§ 186.11, subd. (a)(2)). With respect to all three defendants, the jury found the victims' aggregate losses exceeded $150,000 (§ 12022.6, subd. (a)(2)). The jury also convicted Montez of conspiracy to forge documents (§§ 182, subd. (a)(1), 470, subd. (d)) and conspiracy to file a false instrument (§§ 115, subd. (a), 182, subd. (a)(1)).

The trial court sentenced Montez to seven years in state prison and Ontiveros to five years. The court suspended imposition of sentence on Johnson and granted her five years' probation on condition, among other things, that she serve 365 days in jail.

Montez contends there was insufficient evidence to support his convictions of conspiracy to commit grand theft and conspiracy to obtain property, labor or services by false pretenses.

Ontiveros contends the trial court committed two instructional errors: failing to instruct the jury sua sponte on accomplice liability; and instructing the jury not to consider others who might have been involved in the crime but were not on trial.

Johnson contends the trial court erred by failing to instruct sua sponte on her mistake of fact defense and abused its discretion by excluding evidence of prior misconduct to impeach the credibility of a key prosecution witness. Johnson also claims the court should have instructed the jury sua sponte to determine whether the conspiracy to commit grand theft and the conspiracy to obtain property, labor or services by false pretenses constituted a single conspiracy or separate conspiracies. In addition, Johnson claims her conviction for conspiracy to obtain property by false pretenses must be

dismissed under section 654 because it was a necessarily included offense of the conspiracy to commit grand theft.[2]

FACTS

Montez is the brother of Alberto Montes, who was pastor of Nuevo Dia church in Vista.[3] In 2002 Montez had a vision from God to build houses for church members, who were primarily low-income Latinos. Pastor Montes was originally supportive of the idea because it sounded like a worthy cause. At about the same time, the church hired Christopher Baiz to draw up plans for an activity center for the church. Baiz claimed to be a real estate developer and held himself out as an architect even though he was unlicensed and had only a trade school certificate in architecture. When Montez told Baiz about his vision, Baiz said he too had visions from God to help people. Baiz explained that affordable houses could be built by buying land, getting a construction loan to build the houses, securing a take-out loan to repay the construction loan and then refinancing the constructed houses for at least twice of the cost to build them, with a percentage of the profit to be reinvested in the pool to build more houses. Montez and Baiz cofounded First Latino Financial Alliance Community Development Corporation (First Latino) to bring their visions to fruition.

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2 The Attorney General concedes that appellants' convictions for conspiracy to obtain property, labor or services by false pretenses (§§ 182, subd. (a), 532) must be reversed under section 654 because the target crimes of the two charged conspiracies were the same crime. (See part II, *post*.)

3 The two brothers spelled their surname differently because when Pastor Montes was in the military, they misspelled his name, using an "s" instead of a "z." The pastor retained that spelling.

Starting in August or September 2002, Montez and Baiz made presentations at Nuevo Dia and other churches promoting First Latino and soliciting money. The presentations, which were often given in Spanish, started with a prayer, and bible verses were frequently quoted to further legitimize the venture as Christian-based. Montez and Baiz, and later Ontiveros who joined First Latino in 2003, made power point presentations and represented they had a team—including an architect, a construction engineer, a licensed contractor, a landscaper and other support staff—to build houses within eight months to one year. Baiz represented himself as the architect in the presentations, First Latino brochures and other documents. Montez referred to himself as "Dr. Rolando Montez" and claimed to have a doctorate degree in theology.

Under First Latino's home buying program (HBP), people who invested $7,500 were guaranteed a position on a list to obtain a house. After the residence was built, the $7,500 would be used to pay the first six months of the mortgage. After that, the estimated $184,500 purchase price of the lot and the building costs would be paid off by refinancing with the equity on the property's anticipated increased value of $350,000 to $400,000. Homeowners would then reinvest their equity with First Latino to build more homes. To help build the houses, First Latino also had an investment program in which church members were encouraged to invest large sums of money for a 20 percent return.

One of the first investors was Filiberto Urias, a mechanical engineer, who in October 2002 invested $180,000 for one year. Montez assured Urias that the turnaround time for building houses was eight months. Urias trusted Montez because of his association with Nueva Dia church and Pastor Montes. Urias testified that he had

thought the stated mission of First Latino was a worthy cause and also liked the promised 20 percent return.

Also in October, Ronald Bush, who had installed computers for the First Latino office, paid $1,500—at Montez's urging—as partial payment of the $7,500 needed to secure a house under the HBP. Bush received a receipt stating construction of his house would start upon payment of the full $7,500; however, later Montez told Bush he would not have to pay the remainder if he was "part of the organization." Montez promised to hire Bush. Montez next asked Bush to permit First Latino to use his name and credit history to buy a house; Montez claimed he had a method that would eliminate the mortgage so that Bush would own the house outright. In the meantime, Montez told Bush that First Latino would make the mortgage payments. Bush agreed.

In December 2002 Pastor Montes invested $140,000 to help Montez purchase a plot of land in Vista called "Alta Vista," which had an approved tentative map to subdivide it into eight lots. The purchase price was $600,000, subject to a $300,000 loan. Montez took title to 50 percent of the property, and Montes and his wife took title to the other 50 percent.

In February 2003 Montez bought a plot of land called "Monte Vista," which was in a flood plain. First Latino planned to build three houses on the Monte Vista property.

On February 22, 2003, Montez, Baiz and Ontiveros hosted a groundbreaking ceremony on a plot of land called "Shelsteve" even though First Latino had not acquired

the property yet.[4] Montez cautioned the audience that although the process of home construction was lengthy, construction activity on the property would begin that week. Montez also said that he was limiting enrollment in the HBP to 40 because First Latino believed it could only build 40 houses in the first year. Only one house was to be built initially on the Shelsteve property because of the slope and soil stability problems. (See fn. 4, *ante*.)

Meanwhile, Baiz hired draftsmen and set up an architectural division. Baiz contracted with Nick Servin, a longtime friend and former partner, to provide civil engineering services. After several months, no work had started on the Shelsteve property. The City of Vista had not given approval for building because of grading, soil and drainage problems. Baiz's and Servin's submittals for Shelsteve and Alta Vista were not acceptable to the city, which repeatedly requested corrections.[5] At trial, John Conley, a Vista planning inspector, testified he had serious concerns about Baiz's work product.

Between October 2002 and December 2004, more than 70 individuals invested $7,500 in the HBP. Those who testified at trial said they trusted Montez and Ontiveros

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4 It was not until April 2003 that First Latino purchased the Shelsteve property, which had a steep slope and soil stability problems.

5 Servin was a licensed civil engineer. He had a contractor's license, but it had been suspended at the time he was working for First Latino. Baiz claimed on his resume that he had a contractor's license, but the license number on the resume belonged to Servin, who had not given Baiz permission to use it. Baiz's general contractor license had been revoked in 1998. Without a contractor's license, a person cannot bill more than a few hundred dollars a year for services.

because of their affiliation with the church and their use of prayer and scripture. Some paid the $7,500 in a lump sum; others paid in installments. First Latino encouraged a number of potential home buyers to refinance their current homes so they would have the available money to participate in the program.

In some instances, First Latino misused the credit history of one individual to refinance and purchase homes for another individual. Maria Romero, a longtime, elderly church member who owned a two-bedroom condominium for a family of eight, wanted a bigger residence. Romero gave Montez permission to arrange a refinancing of her condominium to obtain the $7,500 for the HBP. When refinancing could not be obtained, Montez told Romero that he could arrange refinancing if she would agree to use fellow church member Alfonso Torres's credit history instead of her credit history and temporarily give title to the condominium to Torres. After Montez assured Romero that she would quickly regain title to her condominium and promised to "represent [her] interest as if [she] was his own mother," Romero agreed. Romero believed she was investing $7,500 in the HBP. She did not understand that Montez had arranged the sale of Romero's condominium to Torres. Torres also did not understand the ramifications of the transaction or how it would work. Torres had agreed, at Montez's urging, to allow Romero to use his credit history to refinance her condominium. Torres, who had already invested $7,500 in the HBP and $22,500 in the investment program, agreed to allow Romero to use his credit history because he thought it would help First Latino build houses for low-income Latinos. In fact, under Montez's transaction, Romero's residence was sold to Torres, but Montez did not tell Torres. Torres did not learn what had been

done until he tried to purchase another residence later in 2003. As a result of the transaction, Romero's and Torres's mortgage payments increased. First Latino paid Romero's mortgage payments for one year until Romero sued First Latino. Romero was not informed that Montez had invested $117,500 of her proceeds from the condominium sale in First Latino.

First Latino also convinced other individuals to invest in its investment program. Montez persuaded Reynalda Aguilar to refinance her home and invest $25,000 of the resulting equity in First Latino, telling her that she would received a 20 percent return in one year. Carlos Torres, who had already joined the HBP, believed in Montez's vision of providing houses for poor Latinos and allowed Montez to arrange for the refinancing of his residence. Carlos Torres invested $30,000 in First Latino on the same terms promised to Aguilar. Ignacio Medina also refinanced his residence and invested $150,000 with the understanding that he would receive a 20 percent return.

The record is not clear when Johnson, the pastor and bishop of her own church—the "Jesus Way of Love"—joined First Latino as the head of the credit repair department. One of Johnson's functions was to discourage homebuyers and investors from withdrawing their money from First Latino. Johnson continued to do so and to solicit investors long after it became apparent that First Latino would fail.

By mid-2003, a number of homebuyers and investors began asking questions as work had not started on any of First Latino's three properties. Furthermore, the number of people who had paid $7,500 in the HBP and been promised a house far exceeded the number of lots available for construction. When a buyer or investor questioned the lack

of progress, Montez and Ontiveros made excuses for the delay, largely blaming the City of Vista for dragging its feet in issuing the required approvals and permits.

By August, some homebuyers and investors had demanded that First Latino return their money.[6] A few months later, Pastor Montes and his wife Aurelia demanded Montez return the money they invested in Alta Vista because they had lost confidence in First Latino.

In November, Baiz quit First Latino. He testified there was insufficient money to build the houses on the Shelsteve property and to pay staff. Also, Baiz learned that Montez was falsely representing that loan applicants were First Latino employees so that the applicants could qualify for loans. When Baiz confronted Montez about the impropriety of this, Montez replied: "God's law takes precedence over man's law. Therefore, we don't follow man's law; we follow God's law." When Baiz brought the matter up at a department head meeting, Montez said that he was "going to do whatever it took to get the company afloat." The department heads, who included Ontiveros and Johnson, voted to support Montez. When Baiz urged Montez to execute their "exit strategy"—namely, that if the project was failing, they would sell the property and pay back the investors—Montez refused. Baiz testified that his role was to develop the

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6 Among those who demanded a refund were Alan and Erna Belshaw. Although Montez and other First Latino administrators used delay tactics and tried to pressure the Belshaws to forgo their demand, the couple persisted. Eventually, First Latino refunded their deposit. Of the HPB members who testified, the Belshaws were the only ones who recouped all their money.

properties and build houses; he was essentially ignorant of First Latino's financial operations.

In December, First Latino called a meeting of homebuyers and investors. Montez told them Baiz had quit, but the HPB and the investment program would continue for those who wished to remain. Montez promised to make the programs work. He also announced the Alta Vista property would be sold to repay any homebuyer or investor who requested a refund. Flyers were handed out that claimed Alta Vista was in the final stages of the planning process and First Latino was installing improvements, such as sidewalks, and streets, which would increase the value of the property and make it possible to repay everyone. After a number of homebuyers and investors signed up to be repaid, First Latino listed the Alta Vista property for sale at $1.6 million.

Pastor Montes died on March 10, 2004. Aurelia Montes refused to sign papers that Montez said would enable him to repay the $140,000 that she and her husband had invested. On March 24, Montez filed a grant deed with the San Diego County Recorder's Officer that purported to transfer Alberto and Aurelia Montes's 50 percent interest in Alta Vista to Montez so that he would own the property outright. The document had what appeared to be a signature of Aurelia Montes, and it was notarized. Later, the notary, Jacob Miller, admitted to police that Aurelia Montes had not appeared in front of him to sign the document.[7] Miller's notary journal did not have Aurelia Montes's fingerprint or signature. A handwriting expert testified at trial that Aurelia Montes's signature on the

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[7] Miller was tried along with Montez, Ontiveros and Johnson. The jury found him guilty of conspiracy to forge documents. Miller is not a party to this appeal.

deed was "most probably" a forgery. Aurelia Montes testified that she did not sign the document and did not recognize the signature as her own.

Also on March 24, Montez filed a grant deed with the recorder's office transferring the Alta Vista property to First Latino as a gift.

As late as May, Montez and Johnson were soliciting—and accepting—payments for the HBP, with the $7,500 cost bounced up to $12,500.

Allen & Associates, a real estate speculation venture, agreed to purchase Alta Vista for approximately $1.3 million, with First Latino agreeing to carry back a one-month loan of $600,000 of the purchase price. Allen & Associates specified that First Latino use the $700,000 down payment to satisfy the officially recorded liens against Alta Vista. Escrow closed on May 27. The escrow instructions showed payoffs of: $351,549.33 on the first mortgage loan; $145,000 to Aurelia Montes; $133,713 to the Wesley W. Peltzer Trust; $8,167.50 ($7,500 plus interest) to Jason Douglas; $8,167.50 ($7,500 plus interest) to Patrick Bridges; and $7,808.33 ($7,500 plus interest) to Justin Sam Mendoza. These individuals and trusts had either filed a notice of pendency of a lawsuit or mechanic's lien against First Latino. Of the $700,000 down payment, First Latino received a net amount of $33,181.71. Allen & Associates' ability to pay the $600,000 note was delayed because of additional liens that First Latino had to remove and Servin's inadequate services in handling approval of the final map for Allen & Associates.

In the summer of 2004, Urias and other First Latino investors filed complaints with the district attorney's office and asked for a criminal investigation. On August 26,

district attorney investigators, accompanied by sheriff's deputies, served a search warrant at First Latino's business office.

On September 2, Johnson and Montez met with Jose Alanis to discuss a short-term loan to First Latino. Johnson assured Alanis that First Latino was "a good company" and that he could "trust in this company." Alanis, who was unaware of the criminal investigation, testified that he and his wife agreed to loan First Latino $30,000 for one month at 20 percent interest because he believed Montez was a man of faith who was associated with the church. When the due date came, First Latino did not repay the loan, and Montez and Johnson repeatedly told Alanis to have patience and he would be repaid shortly. Montez and Johnson did not mention that First Latino was under investigation.

In December, members of First Latino's administration were arrested, and the operation was shut down. No one had informed Alanis of this development, he only discovered it when he went to the office and found it had been shuttered. Alanis did not get his money back. Some investors got a partial refund, but the vast majority of members in the HBP and investors did not receive any money back.

First Latino did not start construction or preparation work on any of its properties.

First Latino had four bank accounts. Montez, Baiz and Ontiveros had signatory rights on the accounts—they wrote checks, withdrew cash and made purchases with a debit card. A forensic accounting of one account from October 22, 2002 to August 31, 2004, revealed that $858,451 was deposited in the account, which was broken down as $516,874 by named investors, $143,898 in miscellaneous deposits, $172,262 in cash deposits and $25,417 in transfers from other accounts. Forty-one percent of this account

was disbursed to individuals, including $45,208 to Baiz, $35,575 to Montez, $21,518 to Servin and $8,550 to Ontiveros. Sixteen percent of the account ($133,250) was withdrawn in cash or checks made out to cash. Twelve percent or $106,459 was disbursed to investors. Eight percent ($64,881) represented missing checks. A category of other disbursements accounted for 23 percent ($192,352) of the total disbursements. The other disbursements were for miscellaneous goods and services, such as groceries, dining out, automotive supplies and gasoline, airfare, hotels, health club, movie videos, a golf club center, carpeting, upholstery and roofing.

The forensic accounting of the three other accounts covered the period from August 2003 to August 2004. In one of these accounts a total of $327,383 was deposited. Thirty-seven percent of the money in this account was disbursed to various businesses; 28 percent was disbursed to individuals, including employees of First Latino; 24 percent was taken out by Montez either in checks made out to "Cash" or by withdrawals; six percent was disbursed to investors; and the remaining five percent was transferred to other First Latino accounts or represented missing checks.

Approximately $142,000 was deposited in another First Latino account. Of that $74,362 or 52 percent was transferred to other First Latino accounts, $39,330 or 28 percent was withdrawn as cash, $27,482 or 19 percent was disbursed to various entities and individuals, and $686 or 1 percent were payments made to investors.

Approximately $64,225 was deposited in the remaining account, including $48,500 from investors. Fifty-eight percent ($36,920) was withdrawn as cash, 41 percent

($26,400) was transferred to other First Latino accounts and 1 percent ($1,000) was disbursed to an individual.

DISCUSSION[8]

I

Montez contends the evidence was insufficient to support his convictions of conspiracy to commit grand theft and conspiracy to obtain property, labor or services by false pretenses. The contention is without merit.

The gist of the crime of conspiracy under section 182 is the unlawful agreement between the conspirators to commit a criminal offense, accompanied by the undertaking of an overt act pursuant to the agreement. (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.) A criminal conspiracy to commit theft exists "[i]f two or more persons conspire: [¶] . . . [¶] (4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises." (§ 182, subd. (a)(4).)

The offense of conspiracy, which is distinct from its target offense, requires the conspirators to have the specific intent to agree to commit a crime, as well as the specific intent to commit the elements of the target crime. (*People v. Prevost*, *supra*, 60 Cal.App.4th at p. 1399.) The act of one conspirator is the act of all, and each is

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8 Montez adopts and joins Ontiveros's and Johnson's legal arguments. (Cal. Rules of Court, rule 8.200(a)(5).) Johnson adopts and joins Ontiveros and Montez's legal arguments. (*Ibid*.) Ontiveros adopts and joins Johnson's legal arguments. (*Ibid*.)

responsible for everything done by his or her coconspirators, including those things that follow as the probable and natural consequence of the execution of the conspiracy. (*People v. Morante* (1999) 20 Cal.4th 403, 416-417.)

Section 484 proscribes various ways of committing theft, including larceny, larceny by trick or device, and theft by false pretenses.[9] (*People v. Davis* (1998) 19 Cal.4th 301, 304-305.) If the value of the property stolen is greater than $400, the crime is grand theft. (§ 487, subd. (a).) Here, the prosecution proceeded on a theory of grand theft by false pretenses, which involves the fraudulent or deceitful acquisition of possession and title of another's property. (*People v. Ashley* (1954) 42 Cal.2d 246, 258.) To support a conviction for grand theft by false pretenses, it must be shown that the defendant made a false pretense or representation with intent to defraud the owner of his property, and that the owner parted with his property valued in excess of $400 in reliance of the representation. (*People v. Britz* (1971) 17 Cal.App.3d 743, 752.) The crime of obtaining property, labor or services by false pretenses has the same elements but requires corroboration. (§ 532, subds. (a) & (b).)[10]

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9 Section 484 provides, in relevant part, "(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft."

10 Under section 532, subdivision (a), the crime of theft by false pretenses "requires proof that (1) the defendant made a false pretense or representation to the owner of

Thus, to obtain convictions for the crimes of conspiracy to commit grand theft (under a theory of theft by false pretenses) and conspiracy to obtain property, labor or services by false pretenses, the prosecution must prove that Montez, Ontiveros and Johnson had the specific intent to agree to commit the two target crimes as well as the specific intent to commit the elements of section 484 (theft by false pretenses) and section 532, subdivision (a), and that one of the members of the conspiracy committed an overt act in furtherance of the conspiracy. (*People v. Morante*, *supra*, 20 Cal.4th at p. 416.)

The standard of review for determining a claim of insufficient evidence in a criminal case is well-established. "[W]e review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Stanley*

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property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation. [Citations.]" (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842-1843.) Reliance means the false representation materially influenced the victim's decision to transfer the property but it need not be the sole factor motivating the transfer. (*Ibid*.)

However, under section 532, subdivision (b), "[i]f the conviction rests primarily on the testimony of a single witness that the false pretense was made, the making of the pretense must be corroborated." (*People v. Ashley*, *supra*, 42 Cal.2d at p. 259.) Section 532, subdivision (b) provides, in relevant part, "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances."

(1995) 10 Cal.4th 764, 792.) "This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) If the verdict is supported by substantial evidence, we accord due deference to the verdict and will not substitute our evaluations of the witnesses' credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

Here, there was substantial evidence to support the conspiracy convictions. Proof of an express agreement is not necessary to establish a conspiracy. A conspiracy may be proved by circumstantial evidence. Evidence of a conspiracy is sufficient "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Prevost*, *supra*, 60 Cal.App.4th at p. 1399.) "[I]t is not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan." (*Ibid*.)

The jury was able to infer the existence of a conspiracy from the conduct, relationship, interests and activities of Montez, Ontiveros and Johnson. Each of them were department heads, and each solicited memberships in the HBP and money from investors. Each made the same promises: (1) for $7,500 one could obtain a house within a year; and (2) an investment in First Latino would earn 20 percent in a year. Each discouraged buyers and investors from withdrawing their money─even well after it was apparent that First Latino was failing. Each took part in fraudulent loan applications. This circumstantial evidence supported the jury's finding of a conspiracy. A "conspiracy

may be implied from the acts of the conspirators in carrying out a common purpose to an unlawful end." (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 214.)

Circumstantial evidence may also prove an intent to defraud. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1371.) " ' "It is well established that criminal intent may be inferred from the general circumstances surrounding the transactions, and that other similar transactions carried on by a defendant are sufficient to prove guilty knowledge and criminal intent." [Citations.]' [Citation.]" (*Ibid*., quoting *People v. Smith* (1984) 155 Cal.App.3d 1103, 1148 [involving a charge of theft by false pretenses].)

Montez's intent to defraud rested upon his knowledge that the representations made to the members of the HBP and the investors were fraudulent. The jury was presented evidence of numerous misrepresentations made by Montez. For example, Montez promised upward of 70 people they would receive a house for their payments of $7,500 even though First Latino had land for no more than 12 houses. These members of the HBP were assured that their $7,500 payments would be set aside for the first six months of their mortgage payments, when in fact the money was not deposited in escrow accounts, but rather spent on many items that had nothing to do with building houses. There also was evidence that First Latino hosted a groundbreaking ceremony on the Shelsteve property before it obtained the property. Additionally, First Latino continued to solicit new members into the HBP and solicit new investments and to reassure existing buyers they would get their houses long after it was evident the organization could not deliver on any of its promises and could not pay its staff. Furthermore, the intent to defraud could be inferred because those familiar with First Latino's inner workings

should have known that the purported goal to build houses for low-income Latino Christians was not feasible. (*People v. Haines* (1959) 176 Cal.App.2d 41, 45 [intent to defraud may be inferred from conduct of defendant or circumstances surrounding the transaction].) "The evidence need not necessarily establish the defendant's knowledge of the falsity of the representations. It is enough if the evidence establishes that the representations were made recklessly and without information justifying a belief that they were true." (*People v. Daener* (1950) 96 Cal.App.2d 827, 832.)

Evidence that the victims relied upon the misrepresentations and transferred more than $400 to First Latino was overwhelming. Several members of the HBP and investors testified that they joined HBP and/or invested in First Latino and did not seek to withdraw from the venture on the basis of misrepresentations made by Montez, Ontiveros and Johnson. For example, Carlos Torres refinanced his residence and invested $30,000 in First Latino because he trusted Montez and relied on his representations. In addition to the $30,000 lost in the investment, Torres also had to sell his residence because he could no longer afford to pay the mortgage, which had been nearly doubled because of the refinancing. Another example was Lazaro Garcia, who along with his two brothers, invested $7,500 because the First Latino plan "sounded good, and we trusted the people who supposedly were leaders of the . . . church." Garcia referred to Montez and Ontiveros as the church leaders, noted they referred to God a lot, and said he held them in high esteem. After Baiz left and Montez told investors they could ask for their money back, Garcia did not do so because Montez indicated he was going to proceed to build the houses as planned. "At that moment, he made us believe that what he was saying was

true," Garcia testified. We also note that Roy Castillo and his wife were dissuaded from trying to withdraw their investment in late 2003 by Johnson. Castillo trusted Johnson because she was a minister and woman of Christian character. Johnson's representations about First Latino convinced Castillo and his wife not to seek return of their investment at that time.

The convictions for conspiracy to commit grand theft and conspiracy to obtain property, labor or services by false pretenses were supported by substantial evidence. A conviction will not be reversed for insufficient evidence unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" the conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

II

The Attorney General concedes that the convictions for conspiracy to obtain property, services and labor by false pretense (§§ 182, subd. (a), 532, subd. (a)) must be dismissed with respect to Montez, Ontiveros and Johnson. The Attorney General is correct.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. " (§ 654, subd. (a).) We are presented with such a situation. Theft by false pretenses (§ 484) and obtaining property, services and labor by false pretenses (§ 532) are essentially the same crime. The indictment listed the same overt acts for both conspiracies. Under section 654, the conviction on the section 532 conspiracy must be

dismissed in light of the conviction of the section 484 conspiracy. (*People of Pearson* (1986) 42 Cal.3d 351, 355 [if defendant is convicted twice of same offense, remedy is dismissal of one conviction].)

III

By ordering the trial court to dismiss Montez's, Ontiveros's and Johnson's convictions for conspiracy to obtain property, labor or services by false pretenses, we have rendered moot Johnson's contention that the trial court should have instructed the jury to determine whether there were one or two conspiracies.[11]

IV

Ontiveros contends the trial court erred by failing sua sponte to give accomplice instructions regarding key prosecution witness Baiz. We conclude the evidence did not support a finding that Biaz was an accomplice, and any error in failing to give accomplice instructions would have been harmless.

A defendant may not be convicted upon the uncorroborated testimony of an accomplice. (§ 1111.) Section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." To be chargeable with the same offense, the person must be a principal under section 31[12] (*People v. Horton* (1995) 11

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11 For the remainder of this opinion, we shall refer to both conspiracies as the conspiracy to commit grand theft.

12 Included in section 31's definition of a principal are "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense,

Cal.4th 1068, 1113) and must act with knowledge of the criminal purpose of the perpetrator and an intent or purpose of committing, encouraging, or facilitating commission of the offense. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.)

> "If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining 'accomplice.' [Citation.] It also must instruct that an accomplice's incriminating testimony must be viewed with caution [citation] and must be corroborated [citations]. If the evidence establishes that the witness is an accomplice as a matter of law, it must so instruct the jury [citation]; otherwise, it must instruct the jury to determine whether the witness is an accomplice [citation]. [Citations.]" (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)

To trigger the duty to instruct on accomplice testimony, there must be substantial evidence to support a factual finding that a prosecution witness was an accomplice to the crime charged. Substantial evidence is not any evidence, no matter how weak, but evidence sufficient to deserve consideration by the jury. This requires something more than mere speculation. (*People v. Lewis* (2001) 26 Cal.4th 334, 369-370.) Mere knowledge of a crime and presence at the scene is also insufficient because "this fact without more merely means that [the individual] was an eyewitness and not necessarily an accomplice to the crimes." (*Id*. at p. 369.)

On the other hand, if the evidence is insufficient as a matter of law to find that a witness is an accomplice, the trial court need not give instructions on accomplice testimony. (*People v. Horton*, *supra*, 11 Cal.4th at p. 1114.)

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or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (§ 31.)

The defendant bears the burden to prove by a preponderance of the evidence that a witness is an accomplice. (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) Neither Ontiveros, Johnson or Montez has met this burden.

At issue is whether Baiz was an accomplice to the conspiracy to commit grand theft.[13]

There was no basis for the jury to have concluded that Baiz was anything more than a witness to the conspiracy to commit grand theft or a conspiracy to obtain property by false pretenses. Baiz and Montez formed First Latino for the purpose of providing affordable houses to low-income Hispanic Christians. Baiz was in charge of building the houses; Montez, later joined by Ontiveros and Johnson, handled administrative and financial matters for First Latino.

Notwithstanding Baiz's competence or lack thereof, he and his staff proceeded to develop plans for the Shelsteve and Alta Vista properties and continued to do so until Baiz left First Latino. Baiz maintained he was basically unaware about First Latino's financial affairs, which is borne out by his noninvolvement in First Latino's acquisition of the Shelsteve, Alta Vista and Monte Vista properties and his noninvolvement with the collection of money from individual buyers or investors. The fact that Baiz was paid a salary for the work he did and had access to First Latino's expense account, which he frequently used, does not mean that he had the requisite knowledge and intent to be an accomplice in the conspiracy.

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13 By the time of the conspiracy to forge documents and the conspiracy to file a false instrument, Baiz had left First Latino.

Ontiveros argues there was evidence that Baiz had knowledge of the conspirators' criminal purpose and acted with the intent or purpose of committing, encouraging, or facilitating commission of the offenses. First, Ontiveros claims Baiz had the requisite accomplice intent because he was the only one in the organization who had building experience and thus was in a position to know the building plan was unrealistic and therefore a scam. Second, Ontiveros claims the project failed because Baiz was incompetent. On one hand, Ontiveros relies on Baiz's building expertise, and, on the other hand, blames Baiz's incompetence for the failure of First Latino. We are not persuaded by Ontiveros's inconsistent assertions. Ontiveros's argument that Baiz was in a position to know and share the conspirators' criminal purpose is nothing more than a speculative exercise to attribute the criminal intent of an accomplice to Baiz. Speculation is not enough.

Similarly, we also reject Ontiveros's claim that Baiz's status as an accomplice was supported by the fact he repeatedly misrepresented being an architect, which created a false impression in the mind of buyers and investors that First Latino had the necessary level of building expertise to succeed. Although we agree that Baiz misrepresented himself as an architect and that misrepresentation became a part of First Latino's marketing to buyers and investors, Baiz's inflated resume does not establish he had the requisite knowledge and intent to be an accomplice.

Further, even if the trial court had erred by failing to give accomplice instructions, any error would have been harmless.

> "A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is 'sufficient corroborating evidence in the record.' [Citation.] To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.]" (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.)

Here, it is not reasonably probable the jury would have reached a result more favorable to the defendants if it had been given accomplice instruction since there was sufficient corroborating evidence outside of Baiz's testimony. Montez and Ontiveros took payments of $7,500 from about 70 people in exchange for the promise they would receive a house within one year. Both men also promised to pay investors a 20 percent return on their money. Their promises turned out to be worthless. Montez and Ontiveros also convinced people to refinance their current residences so they could join First Latino as members of the HBP or as investors. They arranged for fraudulent paperwork in a number of the refinances. When it became apparent that their venture would fail, they actively discouraged victims from withdrawing their money. Johnson solicited buyers and investors long after it was apparent that First Latino would fail. Johnson also discouraged victims from withdrawing their money. This evidence, standing by itself, was sufficient to support the conspiracy to commit grand theft convictions.

Moreover, the trial court gave the jury guidelines for evaluating the credibility of each witness, including Baiz, who was cross-examined extensively by defense counsel. The guidelines included assessing whether the witness was influenced by the following:

bias or prejudice, a personal relationship with someone involved in the case, a personal interest in how the case is decided, any prior consistent or inconsistent statements, the witness's attitude toward testifying, the reasonableness of the testimony when considered with the other evidence, whether the witness engaged in other conduct that reflects on his or her believability, and whether other evidence disproved the witness's testimony. (CALCRIM No. 226.) Also under CALCRIM No. 226, the jury was cautioned that if it found "a witness deliberately lied about something significant" in the case, it "should consider not believing anything that witness says." Another instruction reiterated that if the jury found a witness committed a crime or other misconduct, it may consider that in evaluating the credibility of the witness's testimony. (CALCRIM No. 316) The court instructed the jury that it is unlawful for a person to practice architecture or to hold oneself out as an architect if he or she is not licensed as an architect, and it is unlawful to use a contractor's license without authorization. (See Bus. & Prof. Code, §§ 5536, 7026.) Under the circumstances of this case, we conclude any error regarding accomplice instructions would have been harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Arias* (1996) 13 Cal.4th 92, 143.) Omission of the accomplice instructions did not deprive Ontiveros of due process and a fair trial. There was no prejudice.

V

Ontiveros contends the trial court committed prejudicial error by instructing the jury not to "consider" others who might have been involved in the crime but were not on trial. [14] The contention is without merit.

We begin by reciting the instruction given to the jury:

> "The evidence shows that other persons may have been involved in the commission of the crimes charged against the defendant--or defendants. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not *speculate* about whether those other persons have been or will be prosecuted. Your duty is to decide whether the defendants on trial here committed the crimes charged." (CALCRIM No. 373, italics added.)

The jury was instructed not to "speculate" about whether an unjoined perpetrator has been or will be prosecuted; the jury was not instructed that it could not "consider" the issue.

The purpose of such an instruction is """to discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators.""" (*People v. Lawley* (2002) 27 Cal.4th 102, 162.)

CALCRIM No. 373 is the successor to CALJIC No. 2.11.5, which before 2004 instructed the jury not to "discuss or give any consideration to" the prosecution of other

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14 We assume Ontiveros is complaining about the instruction with respect to Baiz, who testified. There cannot be any question that the instruction was proper as to unjoined perpetrators who did not testify, such as Terry Samples. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1055.)

participants in the charged crime.[15] The problem with the pre-2004 version of CALJIC No. 2.11.5 (see fn. 14, *ante*) was that it impliedly invited the jury to not discuss or consider otherwise appropriate instructions on the credibility of an unjoined perpetrator who testified at trial. (See *People v. Cox* (1991) 53 Cal.3d 618, 668.) After the Court of Appeal in *People v. Fonseca* (2003) 105 Cal.App.4th 543, 550, suggested a revision to CALJIC No. 2.11.5—namely, one that would simply and straightforwardly instruct the jury not to guess or speculate about whether or not other persons were being prosecuted—the CALJIC Committee revised the instruction accordingly.[16]

CALCRIM No. 373, as well as the 2004 version of CALJIC No. 2.11.5, corrected the potential problem of a jury not considering properly given credibility instructions by replacing the do not "discuss or give any consideration to" language with an admonition not to "speculate" about the prosecution of other participants. The revised "speculate"

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15 Before CALJIC No. 2.11.5 was revised, the instruction read: "There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, *do not discuss or give any consideration* as to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of [each] [the] defendant on trial." (CALJIC No. 2.11.5 (7th ed. 2003) pp. 42-43, italics added.)

16 Although there are minor wording differences, the 2004 version of CALJIC No. 2.11.5 is substantively the same as CALCRIM No. 373. The 2004 version of CALJIC No. 2.11.5 read: "There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. [¶] There may be many reasons why that person is not here on trial. Therefore, *do not speculate or guess* as to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of [each] [the] defendant on trial." (CALJIC No. 2.11.5 (Jan. 2004 ed.) pp. 42-43, italics added.)

language eliminates any lingering prospect that a reasonable juror would misconstrue his or her duty to consider all relevant factors affecting on witness credibility. (See *People v. Fonseca*, *supra*, 105 Cal.App.4th at p. 550.) With the revision, the instruction properly focuses the jury's attention on the evidence against the defendant and discourages irrelevant speculation about the reasons why others were not jointly prosecuted and the eventual fate of such individuals. (See *People v. Cox*, *supra*, 53 Cal.3d at p. 668.)

When we review the propriety of the jury instructions, we view the instructions in context and as a whole. (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) An instruction is not erroneous if no reasonable juror would have misinterpreted the instruction as the appellant suggests. (See *People v. Fonseca*, *supra*, 105 Cal.App.4th at p. 549.) As discussed in part IV, *ante*, the jury had ample instructions to consider Baiz's testimony. The court also instructed the jury not to single out any instruction. (CALCRIM No. 200.) The trial court did not err by giving CALCRIM No. 373.

Ontiveros relies on cases that held it was error to give the pre-2004 version of CALJIC No. 2.11.5 (the "do not discuss or give any consideration" language). (See, e.g., *People v. Brasure*, *supra*, 42 Cal.4th at p. 1055 & fn. 12; *People v Jones* (2003) 30 Cal.4th 1084, 1113; *People v. Williams* (1997) 16 Cal.4th 153, 226-227.) Ontiveros has not cited a case, nor are we aware of any, holding that giving the 2004 revision of CALJIC No. 2.11.5 or CALCRIM No. 373 (the "do not speculate" language) is error.

Assuming it was error to give CALCRIM No. 373, there was no prejudice. "[W]here the jury receives all otherwise appropriate general instructions regarding

witness credibility, there can be no prejudice from jury instruction pursuant to CALJIC No. 2.11.5." (*People v. Fonseca*, *supra*, 105 Cal.App.4th at p. 549.)

VI

Johnson contends the trial court abused its discretion when it excluded prior misconduct evidence to impeach Baiz's credibility. The contention is without merit.

During the cross-examination of Baiz, Montez's trial counsel attempted to impeach him with evidence of a default civil judgment against Baiz in an unrelated case and with the revocation of his contractor's license by the state board.[17] The default civil judgment was based on claims that Baiz entered into a building contract, received money and did not perform. Baiz's license was revoked because he had abandoned a construction project. Montez's trial counsel argued that the judgment and revocation were evidence of Baiz's character for honesty and veracity (Evid. Code, § 780, subd. (e)) and showed that Baiz "is dishonest and . . . deceives people." Counsel indicated that the complainant in the civil action was available to testify.

With respect to the civil judgment, the court sustained the prosecution's objection, finding the evidence was primarily character evidence rather than impeachment evidence and "r[a]n afoul" of the prohibition against using character evidence to prove a defendant's conduct on a specified occasion found in Evidence Code section 1101, subdivision (a). The court also noted that because the judgment was a default judgment there was a possibility of a trial within a trial if Baiz denied the allegations.

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17 Trial counsel for Ontiveros and Johnson joined in the arguments of Montez's trial counsel.

Regarding the license revocation, the court ruled the defense could ask Baiz if his license was revoked when he was working for First Latino, but not the reasons for the revocation.

We need not address whether the proffered evidence was improper character evidence or proper impeachment evidence because the court's exclusion of evidence regarding the civil judgment and the limitation of evidence regarding the revocation was well within the court's discretion under Evidence Code section 352.[18] We review a trial court's order excluding proffered impeachment evidence under Evidence Code section 352 for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9; *People v. Clair* (1992) 2 Cal.4th 629, 655.)

A trial court has broad discretion under Evidence Code section 352 to exclude impeachment evidence. (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) "The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Ibid*.) In exercising its discretion under Evidence Code section 352, a court """'must consider the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relative to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in [Evidence Code] section 352 for exclusion.'""" (*People v. Houston* (2005) 130 Cal.App.4th 279, 304.) The *Wheeler* court also pointed

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18 Evidence Code section 352 permits the exclusion of relevant evidence where "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

out that outside the realm of felony convictions, impeachment evidence often involves "problems of proof, unfair surprise, and moral turpitude evaluation," and, therefore, trial courts "may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 296-297, fn. omitted.)

Here, the trial court did not abuse its discretion in excluding the proffered impeachment evidence; its decision was not so arbitrary, capricious, or patently absurd as to result in a manifest miscarriage of justice. (*People v. Rodriguez*, *supra*, 20 Cal.4th at pp. 9-10.) In assessing the offer of proof by Montez's counsel, the court carefully undertook the appropriate relevance inquiry—namely, whether instances of Baiz not performing work that he was paid for demonstrated a willingness to lie. The court concluded the probative value of this collateral evidence was slight and the prejudicial value of its admission—the potential for confusing and misleading the jury and for consuming undue amounts of time—was much greater.[19] This conclusion is unassailable.

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19 Evidence Code section 352 uses the word prejudice in its " 'etymological sense of "prejudging" a person or cause on the basis of extraneous factors.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Allowing Baiz to be impeached with the default judgment would have required litigation of the underlying facts and whether Baiz was properly served. Admission of evidence regarding the reason the state revoked Baiz's contractor's license also would have required that matter to be litigated. Thus, there would be two minitrials within the trial, which would have necessitated an undue consumption of time and would have been potentially confusing to the jury. Balancing these prejudicial factors (see fn. 19, *ante*) against the slight probative value of the collateral evidence, the court did not abuse its discretion under Evidence Code section 352 to exclude the proffered impeachment evidence.

VII

Johnson contends the trial court erred in failing to instruct sua sponte on a mistake of fact defense as it applied to her knowledge of the illegal practices of First Latino. (See CALCRIM No. 3406.)[20] The contention is without merit.

"At common law, an honest and reasonable belief in the existence of circumstances, which, if true, would make the act with which the person [was] charged

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20 CALCRIM No. 3406 is the form instruction on mistake of fact and reads: "The defendant is not guilty of _____ <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact. [¶] If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <insert crime[s]. [¶] If you find that the defendant believed that _____ <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____ < insert crime[s]>. [¶] If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes)."

an innocent act, was a good defense." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425. The common law rule is codified in section 26, paragraph three, which provides: "All persons are capable of committing crimes except those belonging to the follow classes: [¶] . . . [¶] Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." Under the mistake of fact defense, the defendant's guilt or innocence is determined """as if the facts were as he perceived them."""" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396, italics omitted.)

The court "must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) However, the obligation to instruct on defenses such as mistake of fact arises " 'only if it appears the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' " (*People v. Barton* (1995) 12 Cal.4th 186, 195.) There is no sua sponte duty to instruct on a defense if the evidence of that defense is minimal or insubstantial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145; *People v. Russell*, *supra*, 144 Cal.App.4th at p. 1424.)

In *People v. Russell*, *supra*, 144 Cal.App.4th 1415, the Court of Appeal found the trial court prejudically erred by not instructing on mistake of fact based on "relatively strong" evidence that the defendant believed a motorcycle was in fact abandoned, and that he held the belief in good faith. (*Id*. at p. 1433.) This evidence included the poor condition of the motorcycle, the fact that the defendant found it parked near some trash bins by a repair shop (*id*. at p. 1421), and the defendant's testimony, corroborated by

other witnesses, that he asked an employee of the shop if the motorcycle had been left for repair and was told that it was not. Before the owner reported the vehicle stolen, the defendant also had been stopped for a traffic violation, and he told the citing officer he found the motorcycle and intended to register it in his name. The citing officer ran the vehicle identification number to confirm that the vehicle had not been reported stolen and, at the defendant's request, gave defendant the name of the registered owner. Before he was arrested, the defendant made an attempt to find the registered owner in the hope he would sign the vehicle over. (*Id*. at pp. 1422-1423, 1433.) In light of the relative strength of the evidence that the defendant believed in good faith the motorcycle had been abandoned, the court concluded it was reasonably probable the result would have been different had the court instructed on mistake of fact. (*Id*. at p. 1433.)

Unlike the defendant in *People v. Russell, supra,* 144 Cal.App.4th 1415, Johnson did not testify, and the record contains no direct testimony on her relevant mental state—namely, whether she acted on the mistaken belief that First Latino was a legitimate organization.

Further, the evidence that Johnson believed in the legitimacy of First Latino was relatively weak. From our review of the record, we conclude there was not substantial evidence to trigger a sua sponte obligation to give a mistake of fact instruction. For example, to support her premise that there was substantial evidence supporting a mistake of fact instruction, Johnson relies on the following circumstantial evidence: (1) she was not a founding member of First Latino, (2) she was not a motivational speaker at the presentations to solicit funds, and (3) she did not make significant cash withdrawals from

First Latino's bank accounts. It is of no consequence that Johnson was not a cofounder of First-Latino. No one disputes that Johnson was not a party to the conspiracy when it began. Under conspiracy law, "[a] conspirator cannot be held liable for a substantive offense committed pursuant to the conspiracy if the offense was committed before he or she joined the conspiracy." (*People v. Marks* (1988) 45 Cal.3d 1335, 1345, italics omitted.) The jury was instructed along this line. (CALCRIM No. 419.) As to Johnson's other two points, they do not constitute substantial evidence to support a mistake of fact instruction. We do not agree that a reasonable jury could have found it persuasive that Johnson did not speak at the presentations where money was solicited and did not withdraw large amounts of money from First Latino's bank accounts on the question of whether she believed First Latino was legitimate throughout her time with the organization. (See *People v. Barton*, *supra*, 12 Cal.4th at p. 201, fn. 8 [in this context, substantial evidence "is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive"].)

Johnson also points to the testimony of First Latino victims Filiberto Urias, Roy Castillo and Sergio Garcia, in which they expressed their lay opinion that she sincerely believed that First Latino was a genuine venture to provide affordable homes to low-income Christian Latinos. These individuals testified that Johnson had a good character and sincere religious beliefs, and enjoyed a good reputation in the community. However, this favorable character and reputation testimony does not constitute substantial evidence to support a mistake of fact instruction. (See *People v. Barton*, *supra*, 12 Cal.4th at p. 201, fn. 8.) The favorable character testimony from the First Latino victims merely

showed that these particular individuals believed Johnson was sincere in her stated religious beliefs, including occasions when she tried to answer their questions about First Latino. However, she answered their questions in the context of trying to convince them to stay in the program or release their claims against First Latino long after it was clear that the venture was a failure. Johnson counseled Castillo and convinced him not to withdraw his money in late 2003 by telling him that, among other things, she had total faith in the financial soundness of First Latino. Castillo and his wife trusted Johnson because she was a "bishop" and they viewed her as a minister and a woman of Christian character. Similarly, Johnson counseled and convinced Garcia not to pursue a demand for repayment in late 2003. In the case of Urias, Johnson helped convince him in May 2004 to release his claims against First Latino in exchange for a trust deed on the Monte Vista property, which was worth far less than the money owed to him because it already—unbeknownst to Urias—had been used as collateral for other investors' loans.

Trevor Allen also testified that Johnson had a good character and reputation for honesty, but his favorable testimony of Johnson's character has to be viewed in the context that Johnson had given Allen real property after she was indicted.

Moreover, as late as April 2004, Johnson and Montez were soliciting money for the HBP. In September 2004—two days after the search warrant was served on First Latino's offices—Johnson and Montez met with Jose Alanis and convinced him to lend First Latino $30,000.

We also reject the notion that Johnson presented a mistake of fact defense—namely, she mistakenly believed that First Latino was engaging in legal

practices during her time with the organization. Johnson relies on remarks in her counsel's opening statement indicating that if the evidence showed that First Latino organizers and administrators conspired to defraud investors, she was not a part of the conspiracy because she had a good faith belief that First Latino was a lawful group. However, counsel's opening statement is not evidence. (CALCRIM No. 222.)

Furthermore, Johnson, along with Montez and Ontiveros, defended themselves throughout the trial on the theory that there was no conspiracy and First Latino failed because of Baiz's misrepresentations, incompetence and greed, which resulted in insufficient funds to build houses. Along these lines, we note that Johnson's trial counsel proposed a mistake of fact instruction on behalf of her and her codefendants, which belies Johnson's appellate argument that because of her religious beliefs she lacked the requisite fraudulent intent and therefore merited a sua sponte mistake-of-fact instruction. Johnson's proposed instruction read in pertinent part: "If you find that any defendant believed that Christopher Baiz was in fact an architect who was capable of performing the work he promised to accomplish on behalf of First Latino without violation of the law, then that defendant did not have the specific intent or mental state required for the crimes alleged." The trial court rejected the instruction because it was argumentative as drafted. Nonetheless, the rejected instruction shows Johnson's defense at trial was aligned with that of Montez and Ontiveros, which insisted First Latino was a legitimate operation and laid the blame for its demise squarely on Baiz's shoulders.

Assuming arguendo the trial court should have instructed sua sponte with CALCRIM No. 3406 that she acted because of a mistake of fact regarding the conspiracy

to commit grand theft offense, we nevertheless conclude that error was harmless because the jury necessarily resolved that factual question adversely to Johnson under other, properly given instructions. In *People v. Sedeno* (1974) 10 Cal.3d 703 (overruled on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12 & in *People v. Breverman* (1998) 19 Cal.4th 142, 165), the Supreme Court stated:

> "[I]n some circumstances it is possible to determine that although an instruction [a trial court is required to give sua sponte] was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support [such] a finding . . . has been rejected by the jury." (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 721.)

Since *Sedeno*, the California Supreme Court has applied this rule in appropriate cases. (See, e.g., *People v. Wright* (2006) 40 Cal.4th 81, 98-99; *People v. Maury* (2003) 30 Cal.4th 342, 422; *People v. Lewis* (2001) 25 Cal.4th 610, 646.)

The trial court instructed on the elements of the theft conspiracy counts, including the requisite intent. The court instructed the jury that in order to convict the defendants of the conspiracy, the prosecution had to prove that the defendants had an agreement, shared the intent to commit grand theft, committed an overt act, knowingly and intentionally deceived a property owner by false or fraudulent representation, did so by intending to persuade the owner to relinquish his or her property, and the owner let the defendants have the property because he or she relied on the false representation. Based on these and other instructions, the jury found Johnson guilty of theft conspiracy counts.

In so doing, the jury necessarily found Johnson had the requisite intents for the offense. Furthermore, by finding Johnson had the requisite intent, the jury necessarily rejected Johnson's defense theory (of mistake of fact or ignorance) that she believed First Latino was legitimate. Had the jury found Johnson's defense theory to be persuasive, it would not have found that she acted with the requisite intent for the theft conspiracy counts. Because "the factual question posed by the omitted instruction [i.e., CALCRIM No. 3406] was necessarily resolved adversely to [Johnson] under other, properly given instructions," we conclude the assumed instructional error was not prejudicial. (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 721.)

DISPOSITION

The trial court is directed to dismiss the judgments of conviction for conspiracy to obtain property, labor or services by false pretenses (count 3) as to all defendants.

The trial court shall amend the abstracts of judgment for Montez and Ontiveros accordingly and forward their amended abstracts of judgment to the California Department of Corrections and Rehabilitation.

In all other respects, the judgments are affirmed.

NARES, Acting P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.